No. PD-0275-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

SHANNA LYNN HUGHITT, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Brown County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Shanna Lynn Hughitt.

* The trial judge was Hon. Stephen Ellis, Presiding Judge, 35th District Court, 200 S. Broadway, Ste. 212, Brownwood, Texas 76801.

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* Counsel for Appellant on appeal was James Stafford, 515 Caroline Street Houston, Texas 77002.

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No. PD-0275-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

SHANNA LYNN HUGHITT, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Brown County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals erred in holding possession with intent to deliver did not qualify as a predicate offense for EOCA. "Unlawful manufacture, delivery. . . of a controlled substance" when used in the list of predicate offenses for engaging in organized criminal activity (EOCA) is a reference to that offense by the same name, and it includes (as it always has) possession with intent to deliver. That interpretation is consistent with a plain reading of the statute as a whole and how the legislature would have understood it at the time EOCA was created.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

STATEMENT OF THE CASE

Appellant was indicted for engaging in organized criminal activity (EOCA) with possession of a controlled substance with intent to deliver as the predicate offense. CR 15. Appellant filed a motion to quash and argued at a pretrial hearing that possession with intent to deliver is not a predicate offense for EOCA. CR 50; 3 RR 4. The trial court denied the motion. CR 54. After Appellant's jury trial ended in conviction, she appealed the ruling on the motion to quash, among other things. The court of appeals agreed the indictment should have been quashed and vacated that conviction. *Hughitt v. State*, ___ S.W.3d ___, No. 11-15-00277-CR, 2018 WL 827227 (Tex. App.—Eastland Feb. 8, 2018).

GROUND GRANTED FOR REVIEW

> Is possession with intent to deliver a predicate offense for engaging in organized criminal activity because it falls within "unlawful manufacture, delivery . . . of a controlled substance," which is one of EOCA's enumerated predicate offenses?

STATEMENT OF FACTS

Kevin Sliger was a self-described junkie and methamphetamine-dealer, and he and several others were bringing meth into Brown County. 7 RR 10-11, 151, 155, 159. He and Appellant were the birth parents of an eleven-year-old and used meth

together. 6 RR 241-44; 7 RR 10-12, 113-18, 140-48, 161-68, 246. To his bondsman, Sliger referred to Appellant as his wife. 8 RR 33-34; SX 108. Others called her Sliger's "old lady." 7 RR 210, 220, 243. Appellant drove him around, knew he was dealing meth, and was present for at least two transactions in the months preceding their arrests. 7 RR 163-67, 259-63.

In January 2014, Appellant rented a house in Brownwood and had the utilities turned on, and she and Sliger moved in together. 7 RR 12, 33, 119, 161. When officers executed a warrant on the house a week later, Sliger was in the dining room with 16 grams of meth in his front pants pocket, and Appellant was in what looked to be their shared bedroom. 7 RR 21, 25, 30, 32, 117. She had a little over a gram of meth and a glass pipe under her clothes, and there was an ounce of marijuana in the closet. 7 RR 29-30, 115, 179-81; SX 1-B. A gallon-sized ziploc bag with meth residue was under the mattress. 7 RR 30, 36-37, 49, 115, 125; SX 11; 8 RR 106.

Drug packaging, rolling papers, syringes, and scales were out in the open in the house. 7 RR 22-23, 35-36, 45-47, 52; 8 RR 106; SX 28, 30. There was also a surveillance camera and digital police scanner, and the house was notorious enough in the neighborhood that when the officers were leaving after executing the warrant, the neighbors applauded. 7 RR 14, 21-24, 34, 44, 54; SX 23.

Appellant, Sliger, and others were arrested and charged with possession and engaging in organized criminal activity. 7 RR 66-69, 102-03, 185.

SUMMARY OF THE ARGUMENT

EOCA criminalizes the commission or conspiracy to commit an enumerated predicate offense with the intent to create or participate in a crime ring. TEX. PENAL CODE § 71.02; *O'Brien v. State*, 544 S.W.3d 376, 379 (Tex. Crim. App. 2018). "Possession with intent to deliver" is not specifically named on the list of qualifying predicate offenses in Penal Code Section 71.02, but because it is a statutory manner and means[1] of committing the various "Manufacture or Delivery of Substance" offenses,[2] it should qualify under the enumerated predicate offense of "unlawful manufacture, delivery . . . of a controlled substance." TEX. PENAL CODE § 71.02(a)(5). As argued below, that interpretation is consistent with the meaning that phrase had when EOCA was enacted.

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[1] *Weinn v. State*, 326 S.W.3d 189, 194 (Tex. Crim. App. 2010); *Lopez v. State*, 108 S.W.3d 293, 297 (Tex. Crim. App. 2003) ("[T]here are at least five ways to commit an offense under Section 481.112," including possession with intent to deliver).

[2] *See* TEX. HEALTH & SAFETY CODE § 481.112 (penalty group 1 substances), 481.1121 (penalty group 1-A); 481.113 (penalty group 2 or 2-A); 481.114 (penalty group 3 or 4); 481.119 (miscellaneous substances).

ARGUMENT

The current EOCA statute

In its present form, § 71.02 lists the following predicate offenses:

(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, continuous sexual abuse of young child or children, solicitation of a minor, forgery, deadly conduct, assault punishable as a Class A misdemeanor, burglary of a motor vehicle, or unauthorized use of a motor vehicle;
(2) any gambling offense punishable as a Class A misdemeanor;
(3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
(4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons;
(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception;
(5-a) causing the unlawful delivery, dispensation, or distribution of a controlled substance or dangerous drug in violation of Subtitle B, Title 3, Occupations Code;
(6) any unlawful wholesale promotion or possession of any obscene material or obscene device with the intent to wholesale promote the same;
(7) any offense under Subchapter B, Chapter 43, depicting or involving conduct by or directed toward a child younger than 18 years of age;
(8) any felony offense under Chapter 32;
(9) any offense under Chapter 36;
(10) any offense under Chapter 34, 35, or 35A;
(11) any offense under Section 37.11(a);
(12) any offense under Chapter 20A;
(13) any offense under Section 37.10;
(14) any offense under Section 38.06, 38.07, 38.09, or 38.11;
(15) any offense under Section 42.10;

(16) any offense under Section 46.06(a)(1) or 46.14;
(17) any offense under Section 20.05 or 20.06; or
(18) any offense classified as a felony under the Tax Code.

TEX. PENAL CODE § 71.02(a) (emphasis added to highlight subsection at issue).

The court of appeals's holding

The court of appeals rejected the State's argument that "unlawful manufacture, delivery" in subsection (5) was a reference to the various "Manufacture or Delivery" offenses in the Controlled Substances Act. *Hughitt*, 2018 WL 827227, at *3. It noted that two other courts of appeals had come to the same conclusion. *Id*. (citing *State v. Foster*, No. 06-13-00190-CR, 2014 WL 2466145, at *2 (Tex. App.—Texarkana June 2, 2014, pet. ref'd) (not designated for publication) and *Walker v. State*, No. 07-16-00245-CR, 2017 WL 1292006, at *2 (Tex. App.—Amarillo, Mar. 30, 2017, pet. granted on other grounds[3]) (not designated for publication)). Their

[3] The State Prosecuting Attorney's brief and granted issue in *Walker*, PD-0399-17, assumes that possession with intent to deliver is not a predicate offense of EOCA: "Can a conviction for a charged, but nonexistent, offense be reformed to a subsumed and proven offense that does exist?" After the SPA filed its petition in *Walker*, other convictions for EOCA with possession with intent to deliver as the predicate offense—including this one—emerged in the appellate courts, and the SPA challenged the issue it earlier assumed.

conclusion, at first glance, is not unreasonable. As the statute currently reads, the predicate offenses are listed in a variety of ways. Sometimes the statute lists the statutory section heading—as for most of § 71.02(a)(1)[4] and all § 71.02(a)(3), thus incorporating all manners and means of committing the offense within those headings.[5] Other times, offenses are referred to narrowly, like the reference to only Class A assaults or the weapons offense in § 46.06(a)(1). *See* TEX. PENAL CODE § 71.02(a)(1) & (16). In this context, it is possible to read the words "manufacture or delivery" as a limitation to only those particular manner and means. That the legislature specifically included some possession offenses in 71.02(a)(5)—those committed "through forgery, fraud, misrepresentation, or deception" [6] —also supports a more restrictive interpretation of the clause. But, as shown below, that is

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[4] *See, e.g.*, TEX. PENAL CODE § 19.02 (murder), § 19.03 (capital murder); § 28.02 (arson). The exceptions are a few wording differences—§ 15.031 ("*Criminal* solicitation of a minor"); § 31.07 ("unauthorized use of a vehicle"); and § 30.04 ("burglary of vehicles")—and the inclusion of only "Class A" assaults (§ 22.01(a)(1)).

[5] TEX. PENAL CODE § 43.03 (promotion of prostitution); § 43.04 (aggravated promotion of prostitution); and § 43.05 (compelling prostitution).

[6] *Id*. § 71.02(a)(5).

not in keeping with how the legislature would have understood the phrase at the time EOCA was enacted.

Plain meaning at the time of passage requires a broader reading

Contrary to the court of appeals's position, the phrase "unlawful manufacture or delivery. . . of a controlled substance" must be interpreted as it would have been understood at the time. In interpreting a statute, courts focus on the statute's literal text "to discern the fair, objective meaning of that text *at the time of its enactment*." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (emphasis added).

When EOCA was created in 1977,[7] there was a single, comprehensive offense in the Controlled Substances Act with the section heading "Unlawful Manufacture or Delivery of Controlled Substances."[8] This was Section 4.03. It provided that "a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in

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[7] Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922 (S.B. 151) (eff. June 10, 1977), attached as Appendix A.

[8] Act of 1973, 63rd Leg., R.S., ch. 429, § 4.03, 1973 Tex. Gen. Laws 1132, 1153 (H.B. 447) (eff. Aug. 27, 1973) (originally TEX. REV. CIV. STAT. art. 4476-15 § 4.03), attached as Appendix B.

Penalty Group 1, 2, 3, or 4."[9] Later, it was split by penalty group into multiple statutory sections.[10] Then these were codified in the Health and Safety Code as part of a non-substantive revision, at which point the offenses lost the word "unlawful" from their headings.[11] In each version, however, possession with intent to deliver was included within the offense of "Manufacture or Delivery."

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[9] *Id.*

[10] Act of 1981, 67th Leg., R.S., ch. 268 (H.B. 730), 1981 Tex. Gen. Laws 696, 698-99 (eff. Sept. 1, 1981) (amending TEX. REV. CIV. STAT. art. 4476-15 § 4.03 to include only penalty group one substances and retitling it "Unlawful Manufacture or Delivery of Controlled Substance in Penalty Group 1" and adding §§ 4.031 "Unlawful Manufacture or Delivery of Controlled Substance in Penalty Group 2" and 4.032 "Unlawful Manufacture or Delivery of Controlled Substance in Penalty Group 3 or 4."). It splintered again when LSD (originally in penalty group 1) was moved to its own penalty group (1-A), which resulted in a new "Manufacture or Delivery" statute, still derived from § 4.03 "Unlawful Manufacture or Delivery of Controlled Substances." Act of 1997, 75th Leg., R.S., ch. 745, § 26 (H.B. 1070), 1997 Tex. Gen. Laws 2411, 2446 (eff. Jan. 1, 1998) (adding TEX. HEALTH & SAFETY CODE § 481.1121). Manufacture or Delivery of a Substance Not in a Penalty Group (now TEX. HEALTH & SAFETY CODE § 481.119) was added to the Controlled Substances Act in 1985. Act of 1985, 69th Leg., R.S. (S.B. 639), 1985 Tex. Gen. Laws 1102, 1122 (eff. Sept. 1, 1985) (adding TEX. REV. CIV. STAT. art. 4476-15 § 4.044).

[11] Act of 1989, 71st Leg., R.S., ch. 678, § 1 (H.B. 2136) (eff. Sept. 1, 1989) (codifying § 4.03 as TEX. HEALTH & SAFETY CODE § 481.112, § 4.031 as TEX. HEALTH & SAFETY CODE § 481.113, § 4.032 as TEX. HEALTH & SAFETY CODE § 418.114, and § 4.044 as TEX. HEALTH & SAFETY CODE § 481.119).

Consistent interpretation with the remainder of the statute

Interpreting "unlawful manufacture, delivery . . . of a controlled substance" as a reference to Controlled Substances Act § 4.03 (and what eventually became TEX. HEALTH & SAFETY CODE § 481.112, 481.1121, 481.113 & 481.114) is consistent with how the legislature referred to most of the other predicate offenses at the time. In the five subsections included in the original legislation, most of the predicate offenses are listed by statutory section heading:[12]

> (1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, or forgery;
> (2) any felony gambling offense;
> (3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
> (4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons; or
> (5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception.

Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922 (S.B. 151) (eff.

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[12] While the "heading of a . . . section does not limit or expand the meaning of a statute," TEX. GOV'T CODE § 311.024, the legislature sometimes uses headings as cross-references to other statutes. *See, e.g.,* TEX. PENAL CODE § 30.02 (defining burglary to include entering a habitation with intent to commit "theft or an assault").

June 10, 1977), attached as Appendix A.

All the offenses in original § 71.02(a)(1) and (3) are statutory section headings. Subsection (2)—felony gambling offenses—is a broader category. Instead of a section heading name, it refers to the qualifying offenses by the chapter heading "Gambling" and includes all felonies within the chapter.[13] *See* TEX. PENAL CODE § 47.03 (gambling promotion); § 47.04 (keeping a gambling place); § 47.05 (communicating gambling information); § 47.06 (possession of gambling device or equipment).

Subsection (4), most naturally, is a reference to the elements of what was then Penal Code § 46.06 (now § 46.05). Act of 1973, 63rd Leg., ch. 399, § 1 (S.B. 34), 1973 Tex. Gen. Laws 883, 964 (eff. Jan. 1, 1974). That section makes it an offense if a person "intentionally or knowingly possesses, manufactures, transports, repairs, or sells [particular prohibited weapons]." *Id.* As that section was (and is) entitled "Prohibited Weapons," and this heading was not used, there is no similar argument that it refers to the entire statutory section, including mere possession.

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[13] They have now been downgraded to Class A misdemeanors.

Subsection (5), at issue here, is an amalgamation.[14] There appear to be no other section headings besides "Unlawful manufacture or delivery of controlled substances" in the rest of the subsection. Instead, the language appears to an attempt to include similar offenses in both the Controlled Substances Act and the Dangerous Drugs Act, even though the latter does not organize offenses around headings in a way similar to the Penal Code.

The first clause,

> unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug,

refers to four acts (manufacture, delivery, dispensation and distribution) and two different substances (controlled substances and dangerous drugs). As mentioned above, the first reference, "unlawful manufacture, delivery . . . of a controlled substance," tracks the section heading in the Controlled Substances Act. The Dangerous Drug Act also criminalizes manufacture or delivery of a dangerous drug in violation of the Act (such as delivery other than by a pharmacist in a properly

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[14] This Court need not definitively interpret the meaning of all the references to offenses in subsection (5) since only the phrase "unlawful manufacture, delivery . . . of a controlled substance" is at issue in this case. Nonetheless, that language must be considered in context.

labeled prescription bottle), but there is no separate heading in the Dangerous Drug Act to track. Act of 1973, 63rd Leg., R.S., ch. 429, § 6.03(c) (H.B. 447), 1973 Tex. Gen. Laws 1132, 1167-68 (eff. Aug. 27, 1973) (former Article 4476-14, § 3 & § 15(b) & (d)). Nevertheless, it seems clear through the repeated references to dangerous drugs in this subsection that analogous offenses in the Dangerous Drug Act were meant to be eligible for the organized crime enhancement. Only controlled substances can be unlawfully "dispensed" or "distributed"; the Dangerous Drug Act does not contain these words. Consequently, the phrase "dispensation, or distribution" applies only to controlled substances and appears to be a reference to TEX. HEALTH & SAFETY CODE § 481.128(a) (former Controlled Substances Act § 4.08(a), entitled "Commercial offenses"), which makes it unlawful for a practitioner to distribute or dispense a controlled substance for various reasons (such as without a prescription or valid medical purpose).[15]

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[15] Act of 1973, 63rd Leg., R.S., ch. 429, §§ 3.08 & 4.08 (H.B. 447), 1973 Tex. Gen. Laws 1132, 1147, 1155 (eff. Aug. 27, 1973) (originally at TEX. REV. CIV. STAT. art. 4476-15 §§ 3.08 & 4.08).

The second clause,

> unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception[,]

involves the act of possession, the same two substances, and four manners and means (forgery, fraud, misrepresentation, and deception). The most obvious source for this language is TEX. HEALTH & SAFETY CODE § 481.129(a)(5) (former § 4.09(a)(3)), which prohibits possession of a controlled substance "by misrepresentation, fraud, forgery, deception, or subterfuge."[16] Other than listing the types of fraud in a different order, the only difference in the Controlled Substance Act violation and the reference in Subsection (5) is that "subterfuge" is omitted from Subsection (5). Given the similarity between "deception" and "subterfuge," it seems unlikely that this omission is an intentional limitation to only certain forms of § 4.09(a)(3). Indeed, like the rest of Subsection (5), the language may have been altered slightly to broaden the reach of the statute, particularly to accommodate similar (but not identical) offenses applicable to dangerous drugs. In this case, it appears to invoke Section 14 of the Dangerous Drugs Act, which made it a violation of the Act to "obtain[ ] any dangerous drug" by "forged, fictitious, or altered prescription" or "by

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[16] *Id*. at TEX. REV. CIV. STAT. art. 4476-15 § 4.09 (codified at TEX. HEALTH & SAFETY CODE § 481.129(a)(5)).

means of fictitious or fraudulent telephone calls" or to have "in his possession any dangerous drug secured by such forged, fictitious, or altered prescription or through the means of a fictitious or fraudulent telephone call. . . " Act of 1959, 56th Leg., R.S., ch. 425 (H.B. 556), 1959 Tex. Gen. Laws 923, 927 (eff. Aug. 10, 1959).

Undoubtedly, determining which offenses in the remainder of Subsection (5) are predicate offenses is no easy task. But the phrase "unlawful, manufacture . . . of a controlled substance" should be interpreted as a broader reference to that entire statute because of (1) the identical language in the original heading for "Manufacture or Delivery. . . "; (2) the use of headings in the other parts of § 71.02(a) to refer to entire statutory offenses; and (3) the attempt in this subsection toward the inclusion of more, rather than fewer, analogous offenses.

This analysis does not go beyond a strict textualist, "plain language" interpretation

It is unnecessary to declare the statute ambiguous before noticing that the language in the first part of § 71.02(a)(5) is a reference to the historical name for an offense.[17] This is because a plain language interpretation necessarily involves

[17] The issue of what tools and materials can properly be used to aid in statutory construction in absence of an ambiguity is currently pending in this Court. *Terri*

looking to the language as the legislature would have understood it at the time of passage. In 1981, closer to the time EOCA was enacted, this Court on original submission in *Nichols v. State*, explained:

> We think it obvious that the references of Sec. 71.02(a)(5) to 'unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception' are necessarily references to those offenses as defined in the Controlled Substances Act and the Dangerous Drugs Act.

653 S.W.2d 768, 771 (Tex. Crim. App. 1981) (op. on original submission). Indeed, at the time, the words "unlawful manufacture, delivery" would have been understood as an obvious reference to the Controlled Substances offense of the same name.

Moreover, the legislature has consistently equated Possession with Intent to

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Lang v. State, PD-0563-17 (submitted Feb. 28, 2018) (citing *Boykin*, 818 S.W.2d 782 and TEX. GOV'T CODE § 311.023)). This Court has also recently reiterated that only in the case of ambiguity or absurd results can a court consider extratextual factors like (1) the object sought to be attained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency provision. *Oliva v. State*, No. PD-0398-17, 2018 WL 2329299, at *2 (Tex. Crim. App. May 23, 2018).

Deliver with the offenses of Manufacture and Delivery. This is for good reason. As this Court also recognized, "manufacturing, possessing with intent to deliver, and delivering were all points along the spectrum of the offense of drug trafficking." *Weinn*, 326 S.W.3d at 194 (citing *Lopez*, 108 S.W.3d at 299-300). It would make little sense to start treating the offenses differently for purposes of EOCA. It makes even less sense when § 71.023, Directing the Activities of Criminal Street Gangs, is considered. That offense references its own manufacture and delivery predicate offense by section number—TEX. HEALTH & SAFETY CODE § 481.112(e), (f). TEX. PENAL CODE § 71.023(a)(1). In so doing, it necessarily includes possession with intent to deliver. While it is not impossible that the legislature might want to exempt possession with intent to deliver from EOCA enhancement for gang members but include it for gang leaders, if that were the intent, it would have done so in a less oblique manner. Instead, the references to "unlawful manufacture, delivery" and § 481.112(e), (f) should be interpreted consistently.

Conclusion

The EOCA indictment in this case properly charged possession with intent to deliver as a predicate offense, and the decision of the court of appeals should be reversed and the case remanded for consideration of Appellant's remaining challenge to the EOCA conviction—sufficiency of the evidence.[18]

[18] In the court of appeals, Appellant also argued that the evidence was insufficient to support both of her convictions—possession with intent to deliver in Cause 11-15-00278-CR and EOCA in the instant case. The court of appeals found the evidence insufficient to support a conviction for possessing the between four and 200 grams of the methamphetamine found in Kevin Sliger's pocket and reformed Appellant's conviction to the lesser offense of possession with intent to deliver between one and four grams (the amount Appellant was concealing on her own person). Because the court of appeals vacated the EOCA conviction for lack of a proper predicate, however, it never reached Appellant's sufficiency challenge. *Hughitt*, 2018 WL 827227, at *4. It also purported not to reach the ineffective assistance claims related to the EOCA conviction, but later held that "[a]ll of Appellant's claims of ineffective assistance of counsel are matters that are inherently matters of trial strategy," in addition to observing that some of the claims related to the vacated EOCA conviction. *Id*. at *4, 10.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and remand for consideration of Appellant's unresolved issues challenging her conviction in this cause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,715 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of June 2018, the State's Petition for Discretionary Review was served electronically on the parties below.

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Appendix A

Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922-24

(S.B. 151) (eff. June 10, 1977)

ORGANIZED CRIMINAL ACTIVITY

CHAPTER 346

S. B. No. 151

An Act relating to a definition of "combination" and "conspires to commit" in relation to organized crime and to the offense of engaging in organized criminal activity; creating certain offenses; providing penalties and venue for prosecution; providing testimonial immunity; excluding certain defenses; providing a defense by renunciation; amending the Penal Code to add Title 11, Organized Crime; adding Article 13.21 to the Code of Criminal Procedure, 1965, as amended; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. The Penal Code is amended by adding [30] Title 11 to read as follows:

TITLE 11. ORGANIZED CRIME

CHAPTER 71. ORGANIZED CRIME

"Sec. 71.01. Definitions

"In this chapter, (a) 'combination' means five or more persons who collaborate in carrying on criminal activities, although:

"(1) participants may not know each other's identity;

"(2) membership in the combination may change from time to time; and

"(3) participants may stand in a wholesaler-retailer or other arm's-length relationship in illicit distribution operations.

"(b) 'Conspires to commit' means that a person agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them perform an overt act in pursuance of the agreement. An agreement constituting conspiring to commit may be inferred from the acts of the parties.

"Sec. 71.02. Engaging in Organized Criminal Activity

"(a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following:

"(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, or forgery;

"(2) any felony gambling offense;

"(3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;

"(4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons; or

"(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception.

30. V.T.C.A. Penal Code, §§ 71.01 to 71.05.

"(b) Except as provided in Subsection (c) of this section, an offense under this section is one category higher than the most serious offense listed in Subdivisions (1) through (5) of Subsection (a) of this section that was committed, and if the most serious offense is a Class A misdemeanor, the offense is a felony of the third degree, except that if the most serious offense is a felony of the first degree, the offense is a felony of the first degree.

"(c) Conspiring to commit an offense under this section is of the same degree as the most serious offense listed in Subdivisions (1) through (5) of Subsection (a) of this section that the person conspired to commit.

"Sec. 71.03. Defenses Excluded

"It is no defense to prosecution under Section 71.02 of this code that:

"(1) one or more members of the combination are not criminally responsible for the object offense;

"(2) one or more members of the combination have been acquitted, have not been prosecuted or convicted, have been convicted of a different offense, or are immune from prosecution;

"(3) a person has been charged with, acquitted, or convicted of any offense listed in Subsection (a) of Section 71.02 of this code; or

"(4) once the initial combination of five or more persons is formed there is a change in the number or identity of persons in the combination as long as two or more persons remain in the combination and are involved in a continuing course of conduct constituting an offense under this chapter.

"Sec. 71.04. Testimonial Immunity

"(a) A party to an offense under this chapter may be required to furnish evidence or testify about the offense.

"(b) No evidence or testimony required to be furnished under the provisions of this section nor any information directly or indirectly derived from such evidence or testimony may be used against the witness in any criminal case, except a prosecution for aggravated perjury or contempt.

"Sec. 71.05. Renunciation Defense

"(a) It is an affirmative defense to prosecution under Section 71.02 of this code that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor withdrew from the combination before commission of an offense listed in Subdivisions (1) through (5) of Subsection (a) of Section 71.02 of this code and took further affirmative action that prevented the commission of the offense.

"(b) Renunciation is not voluntary if it is motivated in whole or in part:

"(1) by circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective; or

"(2) by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

"(c) Evidence that the defendant withdrew from the combination before commission of an offense listed in Subdivisions (1) through (5) of Subsection (a) of Section 71.02 of this code and made substantial effort to prevent the commission of an offense listed in Subdivisions (1) through

(5) of Subsection (a) of Section 71.02 of this code shall be admissible as mitigation at the hearing on punishment if he has been found guilty under Section 71.02 of this code, and in the event of a finding of renunciation under this subsection, the punishment shall be one grade lower than that provided under Section 71.02 of this code."

Sec. 2. Chapter 13, Code of Criminal Procedure, 1965, as amended, is amended by adding [31] Article 13.21 to read as follows:

"Art. 13.21. Organized criminal activity

"The offense of engaging in organized criminal activity may be prosecuted in any county in which any act is committed to effect an objective of the combination."

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the senate on May 12, 1977: Yeas 26, Nays 2; May 13, 1977, senate reconsidered the vote by which finally passed; May 13, 1977, again finally passed: Yeas 24, Nays 3; May 24, 1977, senate refused to concur in house amendments and requested appointment of Conference Committee; May 25, 1977, house granted request of the senate; May 27, 1977, senate adopted Conference Report: Yeas 25, Nays 4; passed the house, with amendments, on May 24, 1977: Yeas 128, Nays 4, one present not voting; May 25, 1977, house granted request of the senate for appointment of Conference Committee; May 27, 1977, house adopted Conference Report: Yeas 123, Nays 20, two present not voting.

Approved June 10, 1977.

Effective June 10, 1977.

31. Vernon's Ann.C.C.P. art. 13.21.

Appendix B

Act of 1973, 63rd Leg., R.S., ch. 429, § 4.03, 1973 Tex. Gen. Laws 1132, 1153-54

(H.B. 447) (eff. Aug. 27, 1973)

(excerpt)

cepted if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

(7) Any material, compound, mixture or preparation which contains any quantity of the following substances:

(A) Barbital;
(B) Chloral betaine;
(C) Chloral hydrate;
(D) Ethchlorvynol;
(E) Ethinamate;
(F) Methohexital;
(G) Meprobamate;
(H) Methylphenobarbital;
(I) Paraldehyde;
(J) Petrichloral;
(K) Phenobarbital.

(8) Any compound, mixture, or preparation containing any depressant substance listed in Subsection (d)(7) is excepted if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

(9) Peyote, unless unharvested and growing in its natural state.

(e) Penalty Group 4. Penalty Group 4 shall include any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(2) not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(3) not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(4) not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(5) not more than 15 milligrams of opium per 29.5729 milliliters or per 28.35 grams.

Unlawful manufacture or delivery of controlled substances

Sec. 4.03. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1, 2, 3, or 4.

(b) An offense under Subsection (a) of this section with respect to:

(1) a controlled substance in Penalty Group 1 is a felony of the first degree;

(2) a controlled substance in Penalty Group 2 is a felony of the third degree;

(3) a controlled substance in Penalty Group 3 is a felony of the third degree;

(4) a controlled substance in Penalty Group 4 is a Class A misdemeanor.

(c) The provisions of Section 4.01(c) and (d) do not apply to an offense under this section relating to a controlled substance in Penalty Group 2.

Unlawful possession of a controlled substance

Sec. 4.04. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice.

(b) An offense under Subsection (a) of this section with respect to:

(1) a controlled substance in Penalty Group 1 is a felony of the second degree;

(2) a controlled substance in Penalty Group 2 is a felony of the third degree;

(3) a controlled substance in Penalty Group 3 is a Class A misdemeanor;

(4) a controlled substance in Penalty Group 4 is a Class B misdemeanor.

Possession and delivery of marihuana

Sec. 4.05. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana.

(b) An offense under Subsection (a) of this section is:

(1) a felony of the third degree if he possesses more than four ounces;

(2) a Class A misdemeanor if he possesses four ounces or less but more than two ounces;

(3) a Class B misdemeanor if he possesses two ounces or less.

(c) The possession of marihuana may not be considered a crime involving moral turpitude.

(d) Except as otherwise provided by this Act, a person commits an offense if he knowingly or intentionally delivers marihuana.

(e) Except as provided in Subsection (f) of this section, an offense under Subsection (d) of this section is a felony of the third degree.

(f) An offense under Subsection (d) is a Class B misdemeanor if the actor delivers one-fourth ounce or less without receiving remuneration.

Resentencing

Sec. 4.06. (a) Any person who has been convicted of an offense involving a substance defined as marihuana by this Act prior to the effective date of this Act may petition the court in which he was convicted for resentencing in accordance with the provisions of Section 4.05 of this Act whether he is presently serving a sentence, is on probation or parole, or has been discharged from the sentence.

(b) On receipt of the petition, the court shall notify the appropriate prosecuting official and shall set the matter for a hearing within 90 days.